Supreme Court, U.S.
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No. 03-652

IN THE

Supreme Court of the United States

ANNE M. MCNEIL, *et al.*,
Petitioners,

v.

THE LEGISLATIVE APPORTIONMENT COMMISSION OF THE STATE OF NEW JERSEY, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of New Jersey

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court has jurisdiction to hear this case, in which the opinion of the state court below sets forth two independent and adequate state-law grounds in support of its judgment dismissing Petitioners' claim.

PARTIES TO THE PROCEEDING

Petitioners are Anne M. McNeil, Thomas E. Williams, Roseanna Siebert, Paul DiGaetano, and Kevin J. O'Toole. Respondents are the Legislative Apportionment Commission of the State of New Jersey; Regina L. Thomas, Secretary of State of New Jersey; and Peter C. Harvey, Attorney General of New Jersey.

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STATEMENT

This is a legislative apportionment case. Petitioners seek review of a decision of the New Jersey Supreme Court construing a provision of the New Jersey Constitution that pertains to the division of the State's two largest municipalities (Newark and Jersey City) into legislative districts. *See* N.J. Const. art. IV, § 2, ¶ 3. The New Jersey Supreme Court held that the state constitutional provision was unenforceable, both by operation of the Supremacy Clause and by operation of independent state-law principles. *McNeil v. Legislative Apportionment Commission*, 177 N.J. 364, 400, 828 A.2d 840, 862 (2003), Pet. App. 1a-40a. Because the New Jersey Supreme Court's decision was expressly based on independent state-law grounds as well as on the federal ground on which Petitioners rely, this Court lacks jurisdiction to review the matter.

In the proceedings below, Petitioners sought invalidation of the New Jersey Legislative Apportionment Plan (the "Plan") on the ground that it divided Newark and Jersey City into three legislative districts each, rather than two, which would be the maximum permitted under the plain text of Article IV, Section 2, Paragraph 3, of the New Jersey Constitution. The New Jersey Supreme Court rejected Petitioners' argument, upheld the Plan, and held that Article IV, Section 2, Paragraph 3, of the New Jersey Constitution was unenforceable for three separate and independent reasons. *McNeil*, 177 N.J. at 374-400, 828 A.2d at 845-62, Pet. App. 6a-40a.

First, the court below held that the New Jersey constitutional provision, even if otherwise viable, was preempted by Section 2 of the Voting Rights Act, 42 U.S.C. § 1973. The court determined that "[t]o now create two

districts each in Newark and Jersey City [as directed by Article IV, Section 2, Paragraph 3, of the New Jersey Constitution] would, in the Commission's view and supported by the record, constitute packing [of minority voters] in violation of Section 2 of the [Voting Rights Act]." *McNeil*, 177 N.J. at 384, 828 A.2d at 852, Pet. App. 19a. The court also concluded that enforcement of Article IV, Section 2, Paragraph 3, of the New Jersey Constitution would have the effect of "depriving the Commission of the 'unpacking' tool[, which] would constitute an undue restraint on its reapportionment planning in contravention of the aims and policies of the [Voting Rights Act]." *Id.* The court determined that Article IV, Section 2, Paragraph 3, of the New Jersey Constitution must give way to the superior mandate of the federal statute by operation of the Supremacy Clause, U.S. Const. art. VI, cl. 2. *McNeil*, 177 N.J. at 384-88, 828 A.2d at 852-55, Pet. App. 19a-24a.

Second, the New Jersey Supreme Court held that the state constitutional provision was, in any event, unenforceable by reason of New Jersey's doctrine of "contemporaneous and practical construction." *McNeil*, 177 N.J. at 389, 828 A.2d at 855, Pet. App. 25a. That state-law doctrine requires "that when construing a [state] constitutional provision, the long and unchallenged usage and practical interpretation by those charged with implementation, enforcement and administration of the provision will prevail over the strict construction of the provision." *Id.* at 391, 828 A.2d at 856, Pet. App. 28a. Applying the state-law doctrine to the state constitutional provision before it, the New Jersey Supreme Court determined that, in view of decades of nonenforcement of the constitutional provision by the New Jersey courts as well as by executive- and legislative-branch officials, the constitutional provision was without force and effect. *Id.* at

392, 828 A.2d at 857, Pet. App. 29a (holding that "[a]pplication of [the contemporaneous and practical construction] doctrine to the present case would support the conclusion that the common and unanimously agreed-upon understanding of this Court, and the legal and political communities of this State as well, is that the two-district limitation for Newark and Jersey City *must be ignored*" (emphasis added)). Thus, the court held that the state-law doctrine of "contemporaneous and practical construction" – by itself – rendered unenforceable Article IV, Section 2, Paragraph 3, of the New Jersey Constitution.

Third, the New Jersey Supreme Court held that New Jersey's doctrine of claim preclusion separately barred the claim before it, regardless of the previously considered federal and state substantive doctrines that each provided an adequate and independent basis for dismissal of Petitioners' claim. *Id.* at 393-400, 828 A.2d at 857-62, Pet. App. 30a-40a. The court first expressly identified the source of authority for the doctrine of claim preclusion as Article VI, Section 3, Paragraph 4 of the New Jersey Constitution and the implementing state-court rules. *Id.* at 394, 828 A.2d at 858, Pet. App. 32a. Applying the claim-preclusion doctrine, the court determined that Petitioners were in privity with the plaintiffs in two earlier federal-court cases that had unsuccessfully challenged the Plan. *Id.* at 397, 828 A.2d at 860, Pet. App. 36a (citing *Page v. Bartels*, 144 F. Supp. 2d 346 (D.N.J. 2001) (three-judge court); *Robertson v. Bartels*, 148 F. Supp. 2d 443 (D.N.J. 2001) (three-judge court), *summarily aff'd*, 534 U.S. 1110 (2002)). Petitioners DiGaetano and O'Toole had both been plaintiffs in *Page v. Bartels*. After considering the essential similarities of parties, rights, and remedies in this litigation and in the prior *Page* and *Robertson* cases, the court concluded that "the doctrine of claim preclusion also would lead us to the

striking of the complaint." *Id.* at 393, 828 A.2d at 857, Pet. App. 30a.

In short, the New Jersey Supreme Court's decision is expressly based on (1) the application of the Voting Rights Act, a federal statute; (2) the doctrine of "contemporaneous and practical construction," a state-law doctrine; and (3) the doctrine of claim preclusion, a state-law doctrine. Petitioners here challenge only the state court's application of the Voting Rights Act.

Petitioners do not – and, of course, cannot – seek review by this Court of the New Jersey Supreme Court's application of state law. Petitioners apparently recognize that this Court lacks jurisdiction to review state-court decisions grounded in state law.

But Petitioners, in seeking review by this Court of the New Jersey Supreme Court's application of federal law, ignore an equally fundamental limitation on this Court's jurisdiction that applies when a state court expressly bases its decision on federal- and state-law grounds, and the state-law grounds independently support the state court's decision. Those circumstances clearly apply here and preclude this Court from reviewing the case.

REASONS FOR DENYING THE PETITION

I. THE JUDGMENT OF THE NEW JERSEY SUPREME COURT RESTS ON TWO INDEPENDENT AND ADEQUATE STATE GROUNDS.

Long ago, this Court recognized that it lacks jurisdiction to review a question of federal law decided by a state court if the decision of that court rests on a state-law ground that is independent of the federal question and adequate to support the judgment. *See, e.g., Herb v. Pitcairn*, 324 U.S. 117, 125-

26 (1945) ("This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state law grounds."); *Fox Film Corp. v. Muller*, 296 U.S. 207, 210 (1935) ("[W]here the judgment of a state court rests upon two grounds, one of which is federal and the other nonfederal in character, our jurisdiction fails if the nonfederal ground is independent of the federal ground and adequate to support the judgment."); *Klinger v. Missouri*, 80 U.S. (13 Wall.) 257, 263 (1872). In recent years, the Court has repeatedly reaffirmed this fundamental restraint on the exercise of the Court's jurisdiction over state-court decisions. *See, e.g., Lee v. Kemna*, 534 U.S. 362, 375 (2002); *Lambrix v. Singletary*, 520 U.S. 518, 522 (1997); *Sochor v. Florida*, 504 U.S. 527, 533 (1992); *Coleman v. Thompson*, 501 U.S. 722, 729-30 (1991); *Harris v. Reed*, 489 U.S. 255, 260-61 (1989).

The rationale underlying the jurisdictional limit on the Court's authority has been succinctly stated: "Because this Court has no power to review a state law determination that is sufficient to support the judgment, resolution of any independent federal ground for the decision could not affect the judgment and would therefore be advisory." *Coleman v. Thompson*, 501 U.S. at 729-30. The Court is "not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion." *Herb v. Pitcairn*, 324 U.S. at 125-26; *see also Michigan v. Long*, 463 U.S. 1032, 1040 (1983) ("Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground.").

Here, this doctrine of adequate and independent state-law grounds compels the conclusion that this Court lacks jurisdiction to review the judgment below. As previously noted, the New Jersey Supreme Court's decision upholding the New Jersey Legislative Apportionment Plan was based expressly on *three* separate and distinct grounds: (1) the preemptive effect of the Voting Rights Act, 42 U.S.C. § 1973, as applied to the state constitutional provision at issue here; (2) the doctrine of "contemporaneous and practical construction," a state-law doctrine that precludes the enforcement of a New Jersey constitutional provision when, as here, it has consistently gone unenforced by New Jersey courts and government officials for an extended period; and (3) the New Jersey doctrine of claim preclusion, which barred Petitioners from asserting their claim in this case. *McNeil*, 177 N.J. at 374-400, 828 A.2d at 845-62, Pet. App. 6a-40a.

Thus, of the three grounds expressly identified by the New Jersey Supreme Court as supporting its decision, only the first is premised on federal law. The other two grounds arise under New Jersey law.

That the two state-law grounds expressly relied on by the state court below are "independent" and "adequate" is beyond question. In *Michigan v. Long*, this Court made clear that the "independence" and "adequacy" of state-law grounds are conclusively established merely by virtue of the opinion of the state court containing "a plain statement that [its] decision rests upon adequate and independent state grounds." 463 U.S. at 1042; *see also Harris v. Reed*, 489 U.S. 255, 261 (1989) (holding that the "[t]he *Long* 'plain statement' rule applies regardless of whether the . . . state-law ground is substantive . . . or procedural").

The *Long* "plain statement" rule precludes review of the state-court decision below. As to the New Jersey Supreme Court's determination that the Petitioners had failed to state a claim by operation of New Jersey's doctrine of "contemporaneous and practical construction," the opinion of that court contains the following "plain statement":

> Although we rest our decision on the Supremacy Clause, we nevertheless point to other well-accepted doctrines in our jurisprudence that would lead to the same result. First, is the doctrine of contemporaneous construction. Since Article IV, Section 2, Paragraph 3 was added to our State Constitution in 1966, Newark and Jersey City have been divided into at least three districts. The issue in the past has been where to draw the district lines for each of the three or more districts for Newark and Jersey City and not whether there should be only two districts in each municipality. Based on the decisional law, and the long-standing, unchallenged history of certifying redistricting plans that divided Newark and Jersey City into three or more districts notwithstanding our State Constitution's political boundary requirements, we find the doctrine of contemporaneous and practical construction to be applicable.
>
> * * *
>
> Application of that doctrine to the present case would support the conclusion that the common and unanimously agreed-upon understanding of this Court, and the legal and political communities of this State as well, is that the two-district limitation for Newark and Jersey City must be ignored.

McNeil, 177 N.J. at 388-92, 828 A. 2d at 854-57, Pet. App. 24a-29a.

Similarly, the opinion of the state court below contains the following "plain statement" that the doctrine of claim preclusion serves as an alternative state-law ground to support the court's decision:

> *In addition to the [doctrine of] contemporaneous construction, the doctrine of claim preclusion also would lead us to the striking of the complaint.*
>
> * * *
>
> The genesis of the claim preclusion doctrine predates our 1947 Constitution. As early as 1933, the highest Court in this State declared that "[n]o principle of law is more firmly established than that a single or entire cause of action cannot be subdivided into several claims, and separate actions maintained thereon." *Smith v. Red Top Taxicab Corp.*, 111 N.J.L. 439, 440-41, 168 A. 796, 797 (N.J. E. & A. 1933). That concept was incorporated into the Judicial Article of the 1947 Constitution.
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> * * *
>
> Republican legislators and voters twice have challenged the Bartels redistricting plan in the federal district court, which has twice rejected their claims. *Page, supra*, 144 F. Supp. 2d at 346; *Robertson, supra*, 148 F. Supp. 2d at 443, *summarily aff'd*, 534 U.S. 1110, 122 S. Ct. 914, 151 L. Ed. 2d 881 (2002).
>
> * * *
>
> The *McNeil* plaintiffs assert in their state-law claim that anything except a two-district plan for Newark and Jersey City would violate Article IV, Section 2, Paragraph 3, of the New Jersey Constitution. We also could preclude plaintiffs from proceeding with this litigation based on the doctrine of *res judicata*.

McNeil, 177 N.J. at 393-97, 828 A.2d at 857-60, Pet. App. 30a-36a (emphasis added).

In short, the decision of the New Jersey Supreme Court could not be clearer: The state-law doctrines of "contemporaneous construction" and claim preclusion each independently support the judgment of the court dismissing the complaint. The *Long* "plain statement" rule is easily satisfied. *See Long*, 463 U.S. at 1042. Because the decision below is based on independent and adequate state-law grounds, this Court is without jurisdiction to hear this case.

II. THIS CASE WOULD BE AN EXTRAORDINARILY POOR VEHICLE FOR DECIDING WHETHER SECTION 2 OF THE VOTING RIGHTS ACT SOMETIMES MANDATES THE CREATION OF DISTRICTS IN WHICH PROTECTED MINORITIES CONSTITUTE LESS THAN HALF OF THE VOTING POPULATION BUT EXERCISE SUBSTANTIAL CONTROL OVER ELECTION OUTCOMES.

Even if there were no jurisdictional bar present here, this case would not be an appropriate opportunity for this Court to address the question whether Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, can, in some circumstances, require creation of districts in which minorities constitute less than an absolute majority of the population. This is indeed an important issue on which the lower courts are not in full agreement. But this case would be a very poor vehicle to address the issue, for two reasons.

First, Petitioners did not bring a claim under Section 2 of the Voting Rights Act. Their claim arose under the New Jersey Constitution. The Voting Rights Act entered the equation only as a defense, once Respondents cited the tension between the federal statute and the state constitution.

Thus, this case does not squarely present the federal-law issue.

Second, the New Jersey Supreme Court's ruling came on appeal from the trial court's summary dismissal of the complaint on non-Voting Rights Act grounds. Neither side presented live witnesses, much less the detailed expert testimony on demographics and voting patterns that is the hallmark of any serious Voting Rights Act case. When the Court addresses the issue raised by Petitioners, it should do so in a case with a full factual record concerning voting patterns in a particular State that dictate the percentage of district population that members of minority groups require in order to have a fair opportunity to participate in the political process and to elect candidates of their choice. While the New Jersey Supreme Court felt that it had a sufficient basis to find preemption here, relying on its knowledge of local circumstances as well as the prior federal cases adjudicating challenges to the same redistricting plan under the Voting Rights Act and the U.S. Constitution, that does not mean that this Court should select this case to resolve the important question whether plaintiffs in cases actually brought under the Voting Rights Act may, in appropriate circumstances, demand creation of "coalitional" districts in which minorities have the power to elect candidates of their choice in combination with non-minority voters.

In any event, the court below correctly declined to limit the Voting Rights Act to claims seeking creation of *majority*-black or *majority*-Latino districts. This case illustrates why Section 2 should not be interpreted as requiring creation of majority-minority districts in all settings, but should instead be interpreted as allowing the creation of "coalitional" districts where the minority share of the voting population is

sufficiently large that members of that group have a fair opportunity to nominate and elect their preferred candidates. *Cf. Georgia v. Ashcroft*, 123 S. Ct. 2498, 2511-17 (2003) (applauding the creation of minority "coalitional" districts under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c); *id.* at 2518 (Souter, J., dissenting) (agreeing with the majority opinion as to "coalitional" districts).

The New Jersey apportionment plan used in the 1990s featured districts with heavier concentrations of minorities in and around the Newark and Jersey City areas, and as a result, minorities were substantially underrepresented in the Senate and Assembly. The new map that the Respondent Commission adopted in 2001 unpacked these districts, spread African-American and Latino voters among more districts, and thus increased minority electoral opportunities. A three-judge federal district court then upheld that feature of the map against a Voting Rights Act challenge, ruling that there is no obligation to re-pack minorities to achieve concentrations above 50 percent or more. *See Page v. Bartels*, 144 F. Supp. 2d at 348-69. Two of the Petitioners and their co-plaintiffs initially filed a notice of appeal to this Court, but when the June 2001 Democratic primaries resulted in a record number of African-American and Latino candidates being nominated (in heavily Democratic districts where nomination was tantamount to election), Petitioners and their co-plaintiffs dropped the appeal.

In the November 2001 general elections, these African-American and Latino Democratic nominees all prevailed, giving New Jersey a record number of minority legislators. Moreover, these gains in minority officeholding, or "descriptive representation," did not come at any cost to the minority groups' "substantive representation." Democrats retook control of the Assembly in the first elections held under the 2001 Plan, and minority Assembly members were

thus elevated to committee and subcommittee chairmanships. Likewise, in the November 2003 general elections, also held under the 2001 Plan that Petitioners challenge here, minority candidates once again won in record numbers. And the Senate switched to Democratic control, elevating minority Senators to chairmanships and other key leadership posts, too. All of this took place under a map whose districts are *more* racially and ethnically integrated than they were under the prior map. *See generally Georgia v. Ashcroft*, 123 S. Ct. 2498; *Shaw v. Reno*, 509 U.S. 630 (1993). Therefore, the 2001 Plan complies with the Federal Constitution, the Voting Rights Act, and the State Constitution, and should be left undisturbed.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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